**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 9**

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

# RESPONDENT'S POST-HEARING BRIEF ON REMAND

## I. INTRODUCTION[1]

This case arises from an Amended Complaint and Notice of Hearing ("Complaint") issued by Region 9 of the National Labor Relations Board ("Board"), based on a second amended unfair labor practice charge ("Charge No. 09-CA-184215") filed by the International Brotherhood of Teamsters, Local Union No. 957 ("Union"), alleging Mike-Sell's Potato Chip Company ("Mike-sell's" or "Company") violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act"). A remand hearing occurred before Administrative Law Judge Andrew S. Gollin on November 19, 2018, in Cincinnati, Ohio. The sole purpose of the remand hearing was to consider additional evidence on the Company's alternative defense that—assuming the decision to sell routes is a mandatory bargaining subject—its sale of four routes in 2016 was consistent with an established past practice of unilaterally eliminating routes through sales to distributors.[2] As explained herein, the Company's actions were consistent with past practice, the Expired Contract, the Revised Final Offer, the Paolucci Award, ***and*** the controlling law set forth in *Raytheon Network Centric Systems,* 365 NLRB No. 161 (December 15, 2017). (JX-1; RX-2; RX-3.) Accordingly, Mike-sell's respectfully submits that the Complaint is without merit and should be dismissed in its entirety.

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[1]Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically referenced as "JX-___," "GC-___," "CP-___," and "RX-___," respectively. Merits Hearing Transcript pages are parenthetically referenced as "M. Tr. ___," and Remand Hearing Transcript pages are parenthetically referenced as "R. Tr. ___."

[2] Mike-sell's adamantly maintains its position that the elimination and sale of individual routes—like the closure of discrete business units—is ***not*** a mandatory subject of bargaining. Nevertheless, in the alternative, the Company contends it made no "material, substantial, and significant change" to drivers' terms and conditions of employment by selling the four routes at issue.

## II. STATEMENT OF FACTS ON REMAND / PROPOSED FINDINGS ON REMAND

### A. History of Contractual Language

As evidenced at the merits hearing, from November 17, 2008, through November 17, 2012, Mike-sell's and the Union were parties to a labor agreement ("Expired Contract") that governed the terms and conditions of employment for Route Sales Drivers ("Sales Drivers") and Over-the-Road Drivers ("OTR Drivers"). (JX-1.) The following language in ARTICLE XIX, SECTION 1 of the Expired Contract is identical to that in at least three prior labor agreements, including the agreement in effect from October 5, 1997, until October 6, 2001 ("1997 Agreement"); the agreement that was in effect from October 7, 2001, until October 1, 2005 ("2001 Agreement"); and the agreement that was in effect from October 10, 2005, until October 4, 2008 ("2005 Agreement"):

> **ARTICLE XIX**
> **MANAGEMENT RIGHTS**
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> Section 1. Management of the plant and the direction of the working force, including the right to hire, promote, suspend for just cause, disciplin[e] for just cause, discharge for just cause, transfer employees and to establish new job classifications, to relieve employees of duty because of . . . economic reasons, or other reasons beyond the control of the Company, the right to improve . . . operations, and conditions and distribution of its products, the right to maintain . . . efficiency of employees is exclusively reserved to the Company. It is understood . . . that this authority shall not be used . . . for the purpose of discrimination against any employee because of their membership in the Union, and that no provision of this paragraph shall . . . interfere with, abrogate, or be in conflict with any rights conferred . . . by any other clause contained in this Agreement, all of which are subject to the grievance procedure.

(JX-1, p. 30; RX-44, p. 21; RX-45, pp. 21-22; RX-46, p. 24.)

With one immaterial exception,[3] the following language in ARTICLE VIII-B, SECTION 5 of the Expired Contract is identical to that in at least three prior labor agreements, including the 1997 Agreement, the 2001 Agreement, and the 2005 Agreement:

> **ARTICLE VIII-B**
> **ROUTE BIDDING**
>
> * * *
>
> Section 5. In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee. However, displacements shall be restricted to the employees' service location.

(Tr. 38-40, 188-89; JX-1, pp. 16-17; RX-44, p. 11; RX-45, p. 11; RX-46, p. 12.)

[3] Throughout the parties' past four labor agreements, the only change to ARTICLE VIII-B, SECTION 5 occurred upon ratification of the 2001 Agreement, when a restriction on bumping was eliminated by removal of the following language: "However, displacements shall be restricted to the employee's service location ~~and limited to three (3) successive bumps before assignment~~." (R. Tr. 40-42; *compare* RX-44, p. 11 *with* RX-45, p. 11.) This minor revision has no bearing on the instant dispute.

The following language in ARTICLE XIII, SECTIONS 1 AND 2 of the Expired Contract is identical to that in at least three prior labor agreements, including the 1997 Agreement, the 2001 Agreement, and the 2005 Agreement:

**ARTICLE XIII**
**STEWARDS AND BUSINESS REPRESENTATIVES**

Section 1. The Union may have a steward where members of the Union are employed who shall have the right to receive complaints on conditions covered by this Agreement and make proper inquiries thereto and to perform such other duties that may be imposed upon him by the Union, provided the same does not interfere with his regular duties for the Company and does not affect efficiency. The steward shall be an employee of the Company and a member of the Union. The steward shall not be discriminated against because of his duties as a steward.

Section 2. The Business Representative of the Union, or his successor, shall have the right to visit that part of the Company premises used by bargaining unit members during any reasonable hour of employment. Such Representative shall first secure the permission from management, but management agrees to grant this permission upon request.

(JX-1, pp. 20-21; RX-44, p. 14; RX-45, p. 14; RX-46, p. 16.)

### B. History of Distribution Centers and Manufacturing Plants

Sales Drivers have historically been assigned to a Company-operated Distribution Center ("DC"), each serving as "home base" for different routes and maintaining separate seniority lists. (JX-1, pp. 11, 14, 17; RX-44, pp. 6, 8-9, 11; RX-45, pp. 6, 9, 11; RX-46, pp. 7, 10, 12.) Sales Drivers bid on their preferred routes based on their seniority at the DC in which they work. At the height of the Company's in-house distribution efforts, Mike-sell's had almost a dozen DCs staffed by Union-represented Sales Drivers, including DCs in New Paris, Indiana;[4] Versailles, Ohio; Hamersville, Ohio; Portsmouth, Ohio; Cincinnati, Ohio; Sabina, Ohio; Columbus, Ohio; Springfield, Ohio; Greenville, Ohio; and Dayton, Ohio. (R. Tr. 36-37, 65, 68.) Notably, only the Dayton, Cincinnati, and Columbus DCs employed warehouse workers to assist Sales Drivers and OTR Drivers with loading and unloading product. (R. Tr. 86-87.) Some DCs—including Sabina, Columbus, Springfield, and Dayton—operated within and upon Company-owned buildings and property, whereas the rest operated from leased facilities. (R. Tr. 37, 122, 220-21.) As Mike-sell's sold off more routes, it also closed more and more DCs and sold any Company-owned buildings, property, and assets associated with them. (R. Tr. 123.)

[4] In early 1990, shortly after the Company built its Greenville DC, Mike-sell's closed its New Paris DC. (R. Tr. 37, 67-68.) All New Paris routes were absorbed by the new Greenville DC, including one route in Muncie, Indiana (which will be discussed later). (R. Tr. 37, 321.) Mike-sell's verbally notified the Union of its decision to close the New Paris DC and offered to bargain over any effects, although no drivers were displaced. (R. Tr. 73.)

Mike-sell's has historically operated two manufacturing plants: one located at 333 Leo Street, Dayton, Ohio; and one located at 5767 Dividend Road, Indianapolis, Indiana.[5] The Dayton plant produces ***only*** potato chips, which are transported to ***all*** Company DCs—including the Dayton DC—by OTR Drivers.[6] (M. Tr. 232-33; R. Tr. 87-88, 107, 220-21.) The Indianapolis plant produces ***only*** puff corn and cheese curls (i.e., extruded corn products), which are transported to the Dayton DC, as well as other Company DCs, by OTR Drivers.[7] (M. Tr. 232-33, 722-23, 1038; R. Tr. 107, 220-21; *see also* JX-1, pp. 9, 36 (explaining Indianapolis procedures for OTR Drivers and identifying extruded corn products as among those distributed by Sales Drivers).) In addition, a separate Indianapolis business, known as Pretzels, Inc., manufactures all Mike-sell's pretzel products, which are transported to the Dayton DC, as well as other Company DCs, by OTR Drivers. (M. Tr. 1038-39; JX-1, p. 9.) Thus, it undisputed that ***all*** DCs—including the Dayton DC—have depended on OTR Drivers to deliver some or all of their inventory from another location. (R. Tr. 107.)

### C. History of Parties' Communications

Since the outset of their relationship, Mike-sell's and the Union have communicated regularly about the terms and conditions of employment for Sales Drivers and OTR Drivers. The unrebutted evidence reflects a protocol whereby Mike-sell's management generally informed the Union Steward of each DC

[5] *See* Ohio and Indiana Secretary of State Filings at www.businesssearch.sos.state.oh.us/?=businessDetails/201073 Dec. 2018) *and* www.bsd.sos.in.gov/PublicBusinessSearch/BusinessInformation?businessId=149969&businessType=Domestic%20For-Profit%20Corporation&isSeries=False (Dec. 2018).

[6] Although the Dayton DC is ***nearby*** the Dayton plant, it is still a separate facility that requires OTR Drivers to deliver product from the plant in large semi tractor-trailers. (R. Tr. 107; *see* JX-1, p. 25 (allowing warehouse workers to shift tractor-trailers within the plant yard but prohibiting warehouse workers from driving tractor-trailers from the Dayton plant to the Dayton DC).) The Dayton plant is located at 333 Leo Street, Dayton, Ohio, whereas the Dayton DC is located at 1610 Stanley Avenue, Dayton, Ohio, which is more than half a mile drive according to Mapquest. *See* www.mapquest.com/directions/list/1/us/oh/dayton/45404-1115/1610-stanley-ave-39.786414,-84.191262/to/us/oh/dayton/45404-1007/333-leo-st-39.782619,-84.192205 (accessed Dec. 17, 2018).

[7] *See* Katz, Marc, *Mike-sell's Celebrating 100 Years of Potato Chips*, Dayton Daily News (May 16, 2010), available at www.daytondailynews.com/business/mike-sell-celebrating-100-years-potato-chips/w8zQG1kogd4lvcm96eV73K/ (accessed Dec. 17, 2018); Robertson, Amelia, *The Secrets Behind Mike-sell's*, Dayton.com (June 24, 2015), available at www.dayton.com/blog/seen-and-overheard/the-secrets-behind-mikesell/kaqO8qIKZxyFXkJZTxUAOI/ (accessed Dec. 17, 2018).

about matters affecting unit employees at that DC.[8] (R. Tr. 124-25, 218-19.) For issues involving multiple DCs, or the unit as a whole, Company management sometimes talked with the Union Business Agent also. The Union never stated or implied that Mike-sell's was required to communicate with a Union Business Agent or Officer instead of a Union Steward.[9] (R. Tr. 27-28, 124, 176-77.)

**D. History of Selling Routes**

In the early- to mid-1990s, Mike-sell's closed its Hamersville DC and Versailles DC because their operations were unprofitable. (R. Tr. 37, 44, 110.) All Versailles routes were absorbed by the new Greenville DC, just as the New Paris routes had been,[10] so no drivers were displaced. (R. Tr. 37, 67-68, 73.) As for the Hamersville routes, one was absorbed by the Cincinnati DC, and the other was sold to an independent distributor, leaving one driver displaced. (R. Tr. 37-38, 44-45, 48-49, 102-03, 110-11.) Mike-sell's verbally notified the Cincinnati Union Steward of its decisions to close the Hamersville and Versailles DCs, to absorb most of the routes into other Company DCs, and to sell one Hamersville route to an independent distributor.[11] (R. Tr. 49-50, 75-76, 90, 109.) Mike-sell's made all of these decisions unilaterally, without bargaining with the Union. (R. Tr. 50-51.) The Union did not object to the decisions, made no demand for decisional or effects bargaining, submitted no information request for justification of the decisions, and filed no grievance or unfair labor practice charges. (R. Tr. 51.)

[8] Each DC Union Steward was responsible for representing local unit employees at that DC, including those who wanted to file grievances or raise concerns about potential contract violations. (R. Tr. 172-74; JX-1, p. 20.) Each DC Union Steward also served on the Union Negotiating Committee and actively participated in bargaining the parties' labor agreements. (R. Tr. 173-75; JX-1, p. 31.) In performing their duties, Union Stewards interacted with Mike-sell's management on a daily basis to discuss any operational issues or potential problems related to unit employees' terms and conditions of employment. (R. Tr. 174-75.) The Union Stewards also communicated with Union Business Agents about any perceived problems, and based on those internal discussions, they may file grievances or submit information requests to further investigate. (R. Tr. 175-76; JX-1, p. 20.) Grievances may be filed on behalf of an individual employee, or on behalf of a class of employees. (R. Tr. 216.) It is undisputed that the Union does not need an employee's permission to file a grievance to challenge an alleged contract violation; the Union has the independent discretion and authority to file contractual grievances even against an employee's wishes. (R. Tr. 215.)

[9] Indeed, the parties were keen on including express language in their labor agreements where involvement of the Union Business Agents or Officers was necessary. (JX-1, pp. 16, 18.)

[10] *See* footnote 4, above.

[11] The Hamersville and Versailles DCs were too small to have their own Union Stewards, so their Sales Drivers were represented by the Cincinnati DC Union Steward. (R. Tr. 88.)

In October 2002, Mike-sell's decided to close the Portsmouth DC and sell the geographic territory that had formerly comprised the four Portsmouth routes to an independent distributor,[12] Kenneth Bartley ("Bartley").[13] (R. Tr. 37-38, 52-53, 69, 101-02, 122-23, 127-29.) This action was taken because the entire route sales division was unprofitable, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 129, 231-37.) Mike-sell's verbally notified Union Business Agent Keith Jones—as well as the displaced Sales Drivers—of the decision to close the Portsmouth DC ***and*** sell its routes to an independent distributor.[14] (R. Tr. 54, 70, 73, 76-77, 102, 104-05, 107-08, 128.) Mike-sell's made this decision unilaterally, but offered to bargain over the effects. (R. Tr. 54-55, 130.) The Union did not object to the Company's decision, made no demand for decisional bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 59, 130.) However, the Union did take Mike-sell's up on its offer to bargain over the effects of the Portsmouth route sales, and the parties ultimately agreed that displaced Sales Drivers could bump into another DC or accept severance package. (R. Tr. 38, 55-56, 130; RX-47.) Their effects bargaining was embodied in a Letter of Understanding, which specifically "reserve[d]" the Company's pre-existing "right" to service the Portsmouth territory through other means. (R. Tr. 58-59; RX-47.)

In September 2006, Mike-sell's made the unilateral decision to sell one of its Greenville DC routes (i.e., the Muncie route) to an independent distributor, Francis Distributing.[15] (R. Tr. 130-32, 254-55; RX-48.) This action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its assets to manufacturing. (R. Tr. 134-35, 231-37.) Mike-sell's verbally

[12] After a sale of routes is fully consummated, the former in-house route numbers/identifiers are no longer meaningful, as the sales territory is no longer referenced separately as—for example—"Routes 1, 2, and 3;" it is instead referenced as a whole, such as "the Portsmouth area" or "the Portsmouth territory." (R. Tr. 70.)

[13] Although Bartley purchased most of the territory that formerly comprised the four Portsmouth routes, he did not purchase the exclusive right to service all Mike-sell's customers within that area—just the primary right. (R. Tr. 105-06.) Mike-sell's retained certain accounts in the Portsmouth territory, just as the Company did with regard to the 2016 sales at issue. *See, e.g., Mike-sell's Potato Chip Company*, JD–55–17, pp. 5 (ALJ Gollin, July 25, 2017) (finding that "independent distributors . . . enter into agreements . . . for the primary right to distribute [Mike-sell's] products within a defined geographic territory").

[14] At the time the Union was first notified, Mike-sell's had not yet found an independent distributor who was both willing and able to purchase the Portsmouth sales territory. (R. Tr. 100.) But the Company was nevertheless up-front with the Union about its intent to sell the Portsmouth routes as soon as a qualified buyer was identified. (R. Tr. 100.)

[15] The Muncie route was formerly part of the DC in New Paris, Indiana, before that DC closed and had its routes absorbed by the Greenville DC. (R. Tr. 37, 321.)

notified Greenville Union Steward Jerry Miller ("Miller") of its decision to sell the Muncie route to an independent distributor and offered to bargain over the effects, if any.[16] (R. Tr. 134-35.) This notice was given in advance of the sale. (R. Tr. 134.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 136, 255-56.)

In 2009, Mike-sell's made the unilateral decision to sell one of its Columbus DC routes (i.e., the Mansfield route) to an independent distributor, Snyder's of Berlin. (R. Tr. 136-37, 256-57.) This course of action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 137, 231-37.) Mike-sell's verbally notified Union Steward Harry Donnell ("Donnell") of its decision, explaining that the Company "was looking to sell that particular territory" because it "wanted to move in another direction." (R. Tr. 177-78, 190-91.) This notice was given at least a week in advance of the sale. (R. Tr. 177-78, 190-91.) Union Steward Donnell "wasn't happy about it," and he informed Union Business Agent Michael Maddy ("Maddy"). (R. Tr. 178.) Not only did Mike-sell's not bargain over this decision, but the Company also did not bargain over any effects, as the Expired Contract gave the affected Sales Driver (i.e., Nancy Higginsbothom) the right to bump into another route at the Columbus DC, but she chose to resign instead. (R. Tr. 138, 177-79, 204; JX-1, pp. 16-17.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 138, 179, 257.)

In 2009, Mike-sell's unilaterally decided to sell two of its Columbus DC routes (i.e., the Newark-Granville-Zanesville route, and the Lancaster-Hocking-Hills-Athens route) to an independent distributor, Ohio Citrus. (R. Tr. 138-40, 179-80, 257-58, 260; RX-49.) This course of action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 140-41, 231-37, 259.) Mike-sell's verbally notified Union Steward Donnell of the decision to sell these two routes. (R. Tr. 180-81.) Union Steward Donnell

[16] In this instance, no one was affected because the last Sales Driver to cover the Muncie route had already separated (i.e., Christy Hensel), and no other incumbent drivers had bid on the route. (R. Tr. 134-35, 255, 320.)

was "not happy" about the decision, and he informed Union Business Agent Maddy. (R. Tr. 180-81, 209.) This notice was given in advance of the sale, with an explanation that the Company wanted to "divest itself" of the territory. (R. Tr. 180-81.) Mike-sell's bargained neither over this decision nor its effects, as the Expired Contract already set forth bumping rights for the two affected Sales Drivers (i.e., Jim Phillipi and Pat Kenny). (R. Tr. 141, 180-81, 258, 307-08; JX-1, pp. 16-17.) One of the affected Sales Drivers exercised his right to bump into another Columbus DC route, based on his seniority, while the other affected driver chose to resign instead. (R. Tr. 309-10.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 141, 181-82, 209, 260.)

Less than a year later, Ohio Citrus relinquished the two Columbus DC territories purchased in 2009 (i.e., the Newark-Granville-Zanesville route, and the Lancaster-Hocking Hills-Athens route), no longer wanting to service the territory. (R. Tr. 141-42, 182, 260-61.) Mike-sell's re-absorbed the Newark-Granville-Zanesville route and awarded it to a Columbus DC Sales Driver, Ronnie Page. (R. Tr. 142, 182, 194-95.) But Mike-sell's re-sold the Lancaster-Hocking-Hills-Athens route to another independent distributor, Snyder's of Berlin. (R. Tr. 142-43, 182.) Before the sale occurred, Mike-sell's verbally conveyed the Company's unilateral decision to Union Steward Donnell, who was "not pleased" that the Lancaster-Hocking-Hills-Athens route would be re-sold. (R. Tr. 182-83.) Nevertheless, the Union did not object to the decision, made no demand for decisional or effects bargaining, submitted no information request related to the decision, and filed no grievance or unfair labor practice charge. (R. Tr. 143, 183.)

Shortly thereafter, Snyder's of Berlin relinquished the two territories it had previously purchased from the Company (i.e., the Mansfield route, and the Lancaster-Hocking-Hills-Athens route), no longer wanting to service them. (R. Tr. 144.) Mike-sell's unilaterally decided not to re-absorb either route, in order to further promote a shift from distribution to manufacturing. (R. Tr. 145.) Thus, both sales territories were largely abandoned, except that the "Lancaster" portion of the Lancaster-Hocking-Hills-Athens route was combined with the Company's existing New Lexington route that was serviced by an incumbent Sales Driver at the Columbus DC. (R. Tr. 145.) The Union did not object to the Company's decision, made no demand

for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 146.)

In August 2011, Mike-sell's made the unilateral decision to sell two of its Columbus DC routes (i.e., the Newark-Granville-Zanesville route, and the New Lexington-Lancaster route) to Buckeye Distributing, an independent distributor. (R. Tr. 146-50, 183-84, 189; RX-5.) This course of action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 150, 231-37.) Before the two routes were sold, Mike-sell's verbally notified Union Steward Donnell of the decision to sell them in order to "divest itself of territories that were . . . unproductive." (R. Tr. 184-85.) Union Steward Donnell was "not happy" about the decision, and he informed Union Business Agent Maddy, who commented that Mike-sell's "ke[pt] juggling [the routes] around." (R. Tr. 184-85.) The affected Sales Drivers exercised their contractual right to bump into another route at the Columbus DC, based on their seniority. (R. Tr. 195-96; JX-1, pp. 16-17.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 150-51, 186.)

Prior to November 2011, no one from the Union—whether Union Stewards, Business Agents, Officers, or Attorneys—ever stated or implied that Mike-sell's must bargain over the decision to sell routes to independent distributors. (R. Tr. 59-62.) But in November 2011, Mike-sell's unilaterally decided to sell yet another Columbus DC route (i.e., the Marion route) to Buckeye Distributing. (R. Tr. 151-53, 186-87; RX-5.) Despite that Marion was "one of the higher-performing routes,"[17] Mike-sell's still wanted to sell it because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 153, 186-87, 210-11.) In advance of

[17] At one point, the Marion route had grown so much in terms of sales volume that it had to be split up into two different routes, with one portion becoming the Mansfield route. (R. Tr. 202-03.) Thus, contrary to the anticipated arguments of the Union and/or the General Counsel, there is absolutely no evidence that Mike-sell selectively chose to sell the Marion route because it was ***individually*** "losing money" or "not profitable." (R. Tr. 212-13.)

the sale,[18] Mike-sell's verbally notified Union Steward Donnell of the decision to sell the Marion route, explaining that "the Company was looking to sell that territory" because it "was going in a different direction." (R. Tr. 153, 187, 190-94; RX-43, p. 4.) Union Steward Donnell, in turn, informed Union Business Agent Maddy. (R. Tr. 187-88.) The affected Sales Driver, Angie Watson ("Watson"), had the contractual right and the seniority to bump into another route at the Columbus DC. (R. Tr. 186, 223-24, 261; JX-1, pp. 16-17.) She initially exercised her right to bump into another route, but after a few weeks, she resigned and took a new job elsewhere. (R. Tr. 186, 261.)

On November 9, 2011, the Union filed a class grievance "on behalf of the Sales employees" to challenge the sale of the Marion route ("Watson Grievance"). (R. Tr. 154, 261-62; RX-50.) It was signed by Union Business Agent Matty and stated (in relevant part) as follows: "The Company has stated to . . . Watson that her route will be transferred to an independent operator. The Company is in violation of Articles I, II, and VIII of the [Expired Contract]. I request that the Company bargain over the decision to transfer this route and work to an independent operator and the effects of the decision prior to taking any action. Further facts to be presented at hearing." (R. Tr. 154, 262; RX-50.) Mike-sell's denied the Watson Grievance, based on its long-standing past practice of unilaterally selling routes to independent distributors—a practice to which the Union had never before objected. (R. Tr. 154-55, 158-59, 265-66; RX-50.) The Union did not submit an information request or file an unfair labor practice charge related to the sale of the Marion route. However, the Union did ask Mike-sell's to offer Watson the "same deal" extended to the four Sales Drivers displaced due to the Portsmouth route sales. (R. Tr. 267-70.)

In May 2012, Mike-sell's made the unilateral decision to sell one of its Greenville DC routes (i.e., the Celina-Coldwater route) to an independent distributor, Ryan Young Distributing.[19] (R. Tr. 160-61, 273-74.) This course of action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 168-69, 231-37.) In advance of the sale, Mike-sell's verbally notified Union Steward Miller of the

[18] Union Steward Donnell is certain he received notice of the sale at least one or two weeks in advance, and according to the Union's own admission, Mike-sell's gave notice "three to four weeks" before the sale occurred. (R. Tr. 190, 193; RX-43, p. 4.)

[19] It is undisputed that Mike-sell's and Ryan Young Distributing executed a Bill of Sale and Independent Distributor Agreement governing the sale of the Celina-Coldwater route. (R. Tr. 274-81.)

decision to sell the Celina-Coldwater route. (R. Tr. 169.) The displaced Sales Driver exercised his contractual right to bump into another route at the Greenville DC, based on his seniority. (R. Tr. 168.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 169-70.)

On June 27, 2012, the Watson Grievance was arbitrated. (RX-2, pp. 1-2.) Arbitrator Paolucci took sworn testimony from three witnesses: Sales Driver Angie Watson, Mike-sell's Zone Manager Mark Plummer, and Mike-sell's Human Resources Director Sharon Wille. (R. Tr. 238, 284.) During the arbitration, Mike-sell's witnesses confirmed "the Company's position" that it had the right to "take all of its routes currently being performed by bargaining unit members" and sell them to independent distributors at any time, "without violating any provisions of the [Expired Contract]." (RX-43, p. 9.) To support its case, Mike-sell's relied upon the Company's past unilateral decisions to sell routes without objection from the Union, as well as "Article VIII-B – Route Bidding" and "Article XIX – Management Rights" of the Expired Contract. (CP-1.) The Watson Grievance was denied on September 26, 2012. (RX-2.)

## III. LEGAL ARGUMENT

### A. The Company's sale of Routes 102, 104, 122, and 131 was consistent with its established past practice of unilaterally selling routes traditionally serviced by Teamsters-represented drivers to independent distributors.

Under *Raytheon*, 365 NLRB No. 161, employers "have the right to take unilateral actions . . . that . . . are not a substantial departure from past practice," even if the practice developed under an expired management rights clause. *Id.* at *14. While employers must give notice and an opportunity to bargain over "changes" to the *status quo*, unilateral actions are ***not*** "changes" if they are consistent with an established practice. *Id.* at *17. This is true regardless of "whether a contractual waiver of the right to bargain survives the expiration of the contract," as "the only relevant factual question is whether the employer's action is ***similar in kind and degree*** to what [was done] in the past." *Id.* at *11, *17 (emphasis added) (cites omitted).

To determine if actions are "similar in kind and degree," the primary focus is "whether there has been 'a ***substantial departure*** from past practice.'" *Id.* at *8 (citing *NLRB v. Katz*, 369 U.S. 736, 746 (1962))

(emphasis added). "[M]inor variations" are insufficient to effect a change. *Id.* at *10. "When changes . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice," then the practice may continue unilaterally because the changes are not sufficiently "material, substantial, and significant" to require bargaining. *Id.* (citing *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); *Trading Port, Inc.*, 224 NLRB 980, 983-984 (1976) (no bargaining required when employer applied pre-existing productivity standards, including penalties, but "devised a more efficient means of detecting individual levels of productivity, of policing individual efficiency, and advanced a more stringent view towards below average producers")). Notably, unilateral actions—if consistent with past practice—do not require bargaining even if they reflect "***substantial discretion***." *Id.* at *20 (emphasis added). Indeed, "holding . . . that the exercise of 'discretion' precludes unilateral action, is squarely contrary to the Board's treatment of Section 8(a)(5) cases addressing whether past changes (e.g., wage increases) are part of the status quo that ***must be continued*** without bargaining." *Id.* (emphasis in original).

In *Raytheon*, the Board reinstated its holding in *Shell Oil Co.*, 149 NLRB 283 (1964), that an employer's "***frequently invoked*** practice," while "predicated upon observance and implementation of [a labor contract], had also become an established employment practice and, as such, a term and condition of employment." *See* 365 NLRB No. 161, at *12 (citing 149 NLRB at 287 (emphasis added)). Similarly, in *Westinghouse Electric Corp.*, 150 NLRB No. 136 (1965), the Board confirmed that identifying a "change," even during a contractual hiatus, involves comparing the challenged actions with past actions taken by the employer. *Id.* at *1574. The Board finds no departure from the norm when the employer's actions were but "***a recurrent event in a familiar pattern*** comporting with the [employer]'s ***usual method*** of conducting its manufacturing operations," and "did not appear . . . ***materially varied in kind or degree*** from that which had been ***customary*** in the past." *Id.* at *1576 (emphasis added).

The unilateral sale of routes in 2016 was ***not*** "a material, substantial, and significant change" to Sales Drivers' terms and conditions of employment. *See, e.g.*, *Raytheon*, 365 NLRB No. 161, at *11, *14, *17, *20; *Shell Oil*, 149 NLRB at 287; *Westinghouse*, 150 NLRB No. 136, *1574; *see also The Bohemian Club*, 351 NLRB 1065, 1066 (2007). After all, the Company sold and/or re-sold ***almost five dozen*** routes

between 1990 and 2016. (M. Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2, pp. 7-8; RX-5; RX-6; RX-7; RX-8; RX-9.) One dozen routes were sold/re-sold between mid-2006 and mid-2012. (R. Tr. 130-32, 136-44, 146-53, 160-61, 179-80, 182-84, 186-87, 189, 254-58, 260-61, 273-74; RX-5, RX-48, RX-49.) Then, ***nearly four dozen*** more routes were sold for the first time ***immediately after*** the end of the Expired Contract term, and just two months after the Paolucci Award was issued denying the Watson Grievance. (M. Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2; RX-5; RX-6; RX-7; RX-9.) All of these sales were made for the same purpose: To shift the Company's assets and focus from distribution to manufacturing and branding. (M. Tr. 151-52, 234-44, 237-38, 243-46, 305, 364, 374, 538-50, 605, 669-70, 834-35, 898, 972; R. Tr. 37, 44, 110, 129, 134-35, 137, 140-41, 150, 153, 186-87, 210-11, 231-37, 259; RX-2, pp. 16-19; RX-15; RX-43, p. 9.) While the Union received advanced notice of ***all*** these sales/re-sales, it neither demanded to bargain nor filed a grievance or unfair labor practice charge to challenge them. (M. Tr. 303, 305-06, 308, 321, 330, 332, 346, 357, 360; R. Tr. 49-51, 54, 59, 70, 73, 75-77, 90, 102, 104-05, 107-09, 128, 130, 134-36, 138-39, 141, 143, 146, 150-51, 153, 169-70, 177-87, 190-94, 209, 255-57, 260, 267-70; RX-43, pp. 4, 9.)

The four sales in 2016 "did not . . . ***materially var[y] in kind or degree*** from that which had been ***customary*** in the past." *Westinghouse*, 150 NLRB No. 136, at *1576 (emphasis added). Routes 102, 104, 122, and 131 were sold for the same reason as in the past: to shift Mike-sell's assets and focus from distribution to manufacturing. (*Compare* M. Tr. 151-52, 234-44, 237-38, 243-46, 305, 364, 374, 538-50, 605, 669-70, 834-35, 898, 972; RX-2, pp. 16-19, RX-15; *with* R. Tr. 37, 44, 110, 129, 134-35, 137, 140-41, 150, 153, 186-87, 210-11, 231-37, 259; RX-43, p. 9.) The Union was told of the sales in advance, just as in the past.[20] (*Compare* M. Tr. M. Tr. 303, 305-06, 308, 321, 330, 332, 346, 357, 360 *with* R. Tr. R. Tr. 49-51, 54, 59, 70, 73, 75-77, 90, 102, 104-05, 107-09, 128, 130, 134-36, 138-39, 141, 143, 146, 150-51, 153, 169-70, 177-87, 190-94, 209, 255-57, 260, 267-70; RX-43, pp. 4, 9.) The Company ***sold*** the four territories to the independent distributors for valuable consideration, thereby shifting the risk-of-loss and liquidating assets for reallocation to manufacturing. (*Compare* RX-10, RX-11, RX-12, RX-17 *with* RX-1, RX-2, RX-5, RX-6,

[20] In fact, in an abundance of caution, given the Union's arguments during arbitration of the Watson Grievance that certain of the Company's prior notices were somehow ineffective because they were given verbally (instead of in writing) and/or because they were given to Union Stewards (rather than Union Business Agents), Mike-sell's sent ***written*** notice of the 2016 sales to the ***Union Business Agent***. (RX-43, pp. 11-12; JX-5; JX-6; JX-10.)

RX-7, RX-9, RX-16, RX-32, RX-33, RX-48, RX-49.) Perhaps the biggest difference between the 2016 sales and most prior sales is that no Sales Drivers were laid off. (M. Tr. 113, 182, 248-49, 377, 408.)

### B. Neither the General Counsel nor the Union has presented any evidence that the 2016 route sales varied from past route sales in any material way.

The General Counsel and the Union will likely argue that the 2016 sales are not similar to past sales "in kind and degree" because Routes 102, 104, 122, and 131 were serviced by Sales Drivers based out of the ***Dayton*** DC (as opposed to another DC), and/or because the sale of those routes did not involve the elimination of "remote bin locations" that depended on OTR Drivers to drive further distances to deliver their product. The Union and the General Counsel appear to contend that these facts made Routes 102, 104, 122, and 131 "more profitable" than (and, thus, different from) the routes sold to independent distributors prior to 2016. Even if true, these distinctions make absolutely no difference to the analysis. First and foremost, it is undisputed that ***all*** Sales Drivers and ***all*** routes—including those in Dayton—have consistently relied on OTR Drivers to deliver inventory to their DC and/or "bin." (R. Tr. 86-88, 107, 220-21; JX-1, pp. 9, 25, 36.) OTR deliveries were ***never*** made exclusively to "remote areas" or "bin locations" outside Dayton. Indeed OTR Drivers travel much farther to deliver Mike-sell's puff corn, cheese curls, and pretzels from Indianapolis to the Dayton DC than they ever did to deliver product from Dayton to other DCs or "bin locations," such as those in Cincinnati or Columbus.[21] (M. Tr. 232-33, 722-23, 1038-39; R. Tr. 107, 220-21; *see also* JX-1, pp. 9, 36 (explaining Indianapolis procedures for OTR Drivers and identifying extruded corn

[21] OTR Drivers must make a round trip of over 246 miles (i.e., more than 123 miles each way) to deliver puffcorn, cheese curls, and pretzels from Indianapolis to the Dayton DC, whereas they formerly made a round trip of about 114 miles (i.e., 57 miles each way) to deliver product from Dayton to the Cincinnati DC, and a round trip of about 146 miles (i.e., 73 miles each way) to deliver product from Dayton to the Columbus DC. *See*
www.google.com/search?ei=ul4aXObNBOO6gge8j5XYAw&q=distance+between+333+leo+street+dayton+ohio+and+5767+Dividend+Road%2C+Indianapolis%2C+Indiana&oq=distance+between+333+leo+street+dayton+ohio+and+5767+Dividend+Road%2C+Indianapolis%2C+Indiana&gs_l=psy-ab.3...6171.914797..915991...0.0..0.124.1344.18j1.....0....1j2..gws-wiz.....0i71j35i39j33i10j33i299.4aC7W7wyYfM (Dec. 2018);
www.google.com/search?ei=T2IaXPi0B4qZ_QaH64qIAQ&q=distance+between+333+leo+street+dayton+ohio+and+cincinnati+ohio&oq=distance+between+333+leo+street+dayton+ohio+and+cincinnati+ohio&gs_l=psy-ab.3...156750.158808..159296...0.0..0.168.1382.13j2.....0....1..gws-wiz.....33i299j33i160j33i10.xHIXh9dNcr8 (Dec. 2018);
www.google.com/search?ei=72IaXNjFKuSE_QaUyISADg&q=distance+between+333+leo+street+dayton+ohio+and+columbus+ohio&oq=distance+between+333+leo+street+dayton+ohio+and+columbus+ohio&gs_l=psy-ab.3...73857.76332..76902...0.0..0.103.1106.10j3.....0....1..gws-wiz.....0i71j35i39j33i299j33i160.EnCQK2xftSI (Dec. 2018).

products as among those distributed by Sales Drivers).) Moreover, regardless of which DC served as their "home base," Routes 102, 104, 122, and 131 had a proximity to Dayton similar to routes sold in the past.[22]

As Mike-sell's has reiterated time and again at both the merits and remand hearings, ***the Company's entire in-house distribution system is unprofitable***. Mike-sells has long been intent on shifting away from an outdated and unprofitable distribution model and reallocating its assets and resources toward manufacturing, regardless of the geographic location or "profitability" of individual routes. This fact is made clear by the Company's decision to sell the Marion route, which was among the highest-performing of all. (R. Tr. 153, 186-87, 202-03, 201-11; RX-43, p. 4.) And yet, Mike-sell's sold this route as part of the same business decision that motivated the sale of ***every*** route sold to independent distributors. Accordingly, the General Counsel cannot show that the Company's sale of Routes 102, 104, 122, and 131 "***materially varied in kind or degree***" from other sales that had occurred since the late 1990s. *Westinghouse*, 150 NLRB No. 136, at *1576.

[22] For example, the former Sabina and Greenville DCs each serviced territory that was about 40 miles from the Dayton DC, and the former Springfield DC serviced territory that was about 26 miles from the Dayton DC. In comparison, Routes 102 and 104 each serviced territory that was about 16 miles from the Dayton DC, in Xenia and Bellbrook, Ohio; Route 122 serviced territory between 26 and 46 miles away from the Dayton DC in Springfield and Piqua, Ohio, and Richmond, Indiana; and Route 131 serviced territory about 26 miles away from the Dayton DC in Middletown, Ohio. *See* www.google.com/search?source=hp&ei=y1saXP7KCMyk_Qbzk6zYBg&q=distance+between+dayton+ohio+and+sabina+ohio&btnK=Google+Search&oq=distance+between+dayton+ohio+and+sabina+ohio&gs_l=psy-ab.3..33i299.840.13606..14097...5.0..2.159.4246.44j6.....0....1..gws-wiz.....0..0j35i39j0i131j0i131i10j0i10j0i22i10i30j0i22i30j33i160.ifx9UCGMy14 (Dec. 2018); www.google.com/search?ei=2lsaXNXBA4jj_AaQjba4Dg&q=distance+between+dayton+ohio+and+greenville+ohio&oq=distance+between+dayton+ohio+and+greenville+ohio&gs_l=psy-ab.3...51174.52947..53539...1.0..0.81.763.11.....0....1..gws-wiz.....33i10.kdedRXiiKSI (Dec. 2018); www.google.com/search?ei=EFwaXLaiL4Tv_QbBpLzQAw&q=distance+between+dayton+ohio+and+springfield+ohio&oq=distance+between+dayton+ohio+and+springfield+ohio&gs_l=psy-ab.3...36697.39891..40585...0.0..0.82.802.11.....0....1..gws-wiz.....33i10.GvPmcyNUrp4 (Dec. 2018); www.google.com/search?ei=OlwaXPyfGvGzggex7a3gBQ&q=distance+between+dayton+ohio+and+xenia+ohio&oq=distance+between+dayton+ohio+and+xenia+ohio&gs_l=psy-ab.3...260484.261251..262239...0.0..0.76.349.5.....0....1..gws-wiz.....0i71j33i10.47dbmgtkAUQ (Dec. 2018); www.google.com/search?ei=QV0aXMf6NOa2ggfQnpSwDA&q=distance+between+dayton+ohio+and+bellbrook+ohio&oq=distance+between+dayton+ohio+and+bellbrook+ohio&gs_l=psy-ab.3...42186.43777..44386...0.0..1.259.787.8j0j1.....0....1..gws-wiz.pcvPtCKkoqg (Dec. 2018); www.google.com/search?ei=b10aXLDADsOa_Qar2ZiwCw&q=distance+between+dayton+ohio+and+piqua+ohio&oq=distance+between+dayton+ohio+and+piqua+ohio&gs_l=psy-ab.3...25992.26861..27365...0.0..0.71.327.5.....0....1..gws-wiz.....0i71j33i10.PfA_LF0fi6o (Dec. 2018); www.google.com/search?ei=i10aXJ-3JZLj_AbQwrbACA&q=distance+between+dayton+ohio+and+middletown+ohio&oq=distance+between+dayton+ohio+and+middletown+ohio&gs_l=psy-ab.3..33i299.25644.27028..27588...0.0..0.90.838.11.....0....1..gws-wiz.....0i8i13i30.9jeLm9twHJM (Dec. 2018); www.google.com/search?ei=qF0aXIn6B8q6ggfJjpjIBA&q=distance+between+dayton+ohio+and+richmond+indiana&oq=distance+between+dayton+ohio+and+richm&gs_l=psy-ab.1.0.0i22i30l2.20973.21899..23524...0.0..0.82.347.5.....0....1..gws-wiz.Z3KB01zVC7U (Dec. 2018).

Assuming *arguendo* that Routes 102, 104, 122, and 131 ***were*** closer to Dayton and/or "more profitable" than routes sold in the past, their sale would not be a "substantial departure" from past practice. In *Shell Oil*, 149 NLRB No. 22, the employer had—"on occasion" and for "some years" prior to the labor agreement expiring—subcontracted work that could be performed by unit employees, without notice to or objection by the union. *Id.* at *290. In doing so, the employer relied on certain contract language that purportedly gave it the right to subcontract unit work, and further considered whether it possessed the necessary equipment, materials, know-how, and/or manpower to do the job in-house. *Id.* at *290-91. No employees were laid off as a result of subcontracts entered prior to expiration of the labor agreement. *Id.* at *291. After the contract expired, the employer kept subcontracting without notice to, or bargaining with, the union, and these post-expiration subcontracts ultimately resulted in the layoff of about 60 unit employees. *Id.* The union filed an unfair labor practice charge, claiming all subcontracts entered after the labor agreement expired were in violation of the Act. *Id.* The Board disagreed, finding the employer's "frequently invoked practice . . . while predicated upon observance and implementation of [the expired labor agreement], had also become an established employment practice . . . ." *Id.* at *287. The post-expiration subcontracts "did not materially vary in kind or degree from what had been customary in the past," despite that the specific work subcontracted, and the reasons therefor, varied significantly. *Id.* at *288, **292-93. Furthermore, "the subcontracting did not occur . . . under conditions precluding the Union from invoking collective bargaining with regard to changes in existing practices which . . . had become an established condition of employment." *Id.* at *289-90.

Just as in *Shell Oil*, Mike-sell's naturally exercised some discretion in deciding which routes to sell and when, and that discretion continued both before and after the term of the Expired Contract. But as recognized in *Shell Oil*, this does not demonstrate a departure from the Company's established past practice. Rather, as Member Miscimarra dissented in *E. I. du Pont de Nemours*, 364 NLRB No. 113 (Aug. 26, 2016):

> Take, for example, an employer that has always painted factory walls blue every summer and green every winter. When doing this painting, the employer exercised discretion: it varied the precise shade of blue and green, and it also varied the precise time when the painting would be done. Summer approaches. If the employer again paints the factory walls blue, will that constitute a "change"? In my view, because this is what the employer has always done, it is not a "change" for the employer to do the same thing again.

*Id.* at *16. The Board endorsed this view in *Raytheon*, holding that "employers do not just paint walls. They take all kinds of actions, including many that affect wages, hours, benefits, and other employment terms." 365 NLRB No. 161 at *14. Hence, "an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion." *Id.* at *20 (citations omitted).

The Union and the General Counsel may also attempt to distinguish the sale of Routes 102, 104, 122, and 131 from past sales by comparing their various "effects" on Sales Drivers. (R. Tr. 195-97, 206-10.) They will presumably argue the Union had no reason to challenge prior sales if the individual Sales Drivers involved did not feel "adversely affected," or otherwise "refused" to file a grievance. (R. Tr. 195-97, 206-10.) However, it is undisputed that the Union does not need an employee's permission to file a grievance to challenge an alleged contract violation. (R. Tr. 215.) Rather, the Union has the independent discretion, authority, ***and*** legal duty to file contractual grievances whenever necessary to diligently enforce and preserve the rights of the bargaining unit, regardless of which DC is directly affected and whether individual Sales Drivers care to participate. *See Vaca v. Sipes*, 386 U.S. 171, 177, 191 (1967) ("a union which enjoys the status of exclusive collective-bargaining representative has an obligation to represent employees fairly, in good faith, and without discrimination . . . on the basis of arbitrary, irrelevant, or invidious distinctions," and "a union breaches this duty when it arbitrarily ignores a meritorious grievance or processes it in a perfunctory fashion"); see also *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 843 (7th Cir. 1973) (example of situation where union files grievance on behalf of employees who made no effort to participate); *Barnes v. SVC Mfg, Inc.*, No. 1:12-CV-01468-SEB, 2015 WL 5043114, at *10 (S.D. Ind. Aug. 25, 2015) (same). In any event, the question of whether employees are "affected" by an employer's unilateral decision is irrelevant to the establishment of a binding past practice. Indeed, in *Shell Oil*, the unilateral decisions resulted in no layoffs prior to expiration of the labor agreement, whereas 60 employees were laid off due to unilateral decisions after the contract expired. 149 NLRB No. 22 at **291-92. Thus, despite any differing effects associated with various unilateral decisions, such effects will not preclude the finding of a past practice. *Id.* at 287.

In short, because the Company "frequently engaged in a pattern of unilateral change . . . during the term of the [Expired Agreement], . . . such a pattern of unilateral change bec[ame] a 'term and condition of employment,' and . . . a similar unilateral change after the termination of [the Expired Contract] [wa]s permissible . . . ."[23] *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002). Indeed, "it is the actual past practice of unilateral activity . . . and not the existence of the management-rights clause . . . that allows the employer's past practice of unilateral change to survive the termination of the contract." *Id.* The Company's unilateral decision to sell the four routes at issue was consistent with its past practice, the Expired Contract, the Revised Final Offer,[24] the Paolucci Award (which the Union never sought to vacate), ***and*** controlling Board law. *Raytheon*, 365 NLRB No. 161; *Shell Oil*, 149 NLRB 283; *Westinghouse*, 150 NLRB No. 136; *The Bohemian Club*, 351 NLRB 1065; *see also Wp Co., LLC*, 358 NLRB 318, 323-24 (2012) (affirming ALJ Decision at JD-70-11, 2011 WL 5562019 (Nov. 15, 2011), that employer did not violate Act where it had "longstanding practice" of unilateral changes such that further unilateral action of same ilk was "continuation of the *status quo*"). Thus, Mike-sell's implemented no "material, substantial, and significant change" to mandatory subjects of bargaining.

### C. Even if Mike-sell's *did* materially change the status quo by eliminating the four routes at issue, the Union waived its right to bargain over those decisions.

A party may relinquish bargaining rights through a "clear and unmistakable" waiver. *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Waiver may be established "by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *Am. Diamond Tool, Inc.*, 306 NLRB 570, 570-71 (1992) (internal citations omitted); *see also Gratiot Cmty. Hosp.*, 312 NLRB 1075, 1084-

[23] The Company's practice of unilaterally selling routes actually began under the 1997 Agreement and continued thereafter under the terms of the 2001 Agreement, 2005 Agreement, and Expired Contract. (M. Tr. 303-04, 317, 330-31, 336-38, 350; R. Tr. 37-38, 44-45, 48-49, 52-53, 69, 101-03, 110-11, 122-23, 127-32, 136-40, 142-43, 146-53, 160-61, 179-80, 182-84, 186-87, 189, 254-58, 260, 273-74; RX-1; RX-5; RX-48; RX-49.)

[24] The General Counsel has long insisted the Expired Contract should still be in effect today, as evidenced by its compliance position in pending Board Case No. 09-CA-094143. Mike-sell's disagrees and believes the Expired Contract was only required to remain in effect through June 12, 2013, after which the Company was privileged to lawfully implement its Revised Final Offer (including its Route Bidding and Management Rights Articles) based on the parties' good faith bargaining impasse. As a practical matter, regardless of whether the Expired Contract or the Revised Final Offer applied is ultimately deemed to apply at the time the four routes were sold in 2016, controlling law applies equally to both sets of terms, as their Management Rights Articles are identical, and their Route Bidding Articles are substantively indistinct. (*Compare* JX-1, pp. 16-17, 30 *with* RX-3, pp. 9, 18.)

85. For example, a union waives its bargaining rights "if it receives advance notice of a proposed change and fails to request bargaining." *The Bohemian Club*, 351 NLRB at 1067. Waiver will also occur if no contract is in effect, the union has the chance to request bargaining over a mandatory subject but fails to do so, and further acknowledges the possibility for the same kind of unilateral action in the future by proposing contract language about it. *Diamond Tool*, 306 NLRB at 570-71.

In this case, in addition to the evidence adduced made at the merits hearing (as explained in the Company's Post-Hearing Brief filed at that stage), the following evidence further establishes that the Union engaged in a course of conduct that clearly and unmistakably waived any purported right to bargain over the 2016 sale of routes. First, with the exception of the Marion route, the Union silently accepted the unilateral sale of about a dozen other routes that were sold/re-sold between mid-2006 and mid-2012, as well as the sale of ***nearly four dozen*** more routes that were sold for the first time ***immediately after*** the end of the Expired Contract term, and just two months after the Paolucci Award was issued.[25] (R. Tr. 49-51, 54, 59, 70, 73, 75-77, 90, 102, 104-05, 107-09, 128, 130, 134-36, 138-39, 141, 143, 146, 150-51, 153, 169-70, 177-87, 190-94, 209, 255-57, 260, 267-70; M. Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2; RX-5; RX-6; RX-7; RX-9; RX-43, pp. 4, 9.) The Union's historical acquiescence in the sale of routes, and its consistent failure to demand bargaining, is simply inexcusable. *See, e.g., Post-Tribune Co.*, 337 NLRB No. 192, 1280 (2002) (while a union's prior acquiescence does not operate as an automatic waiver of its right to bargain, where the past practice at issue has occurred with such regularity and frequency as to become the *status quo*, a clear and unmistakable waiver will be found.)

Despite any arguments to the contrary, the Company's notice to Union Stewards was sufficient to put the Union on-notice of these past unilateral sales of routes. As the Board made clear in *Aztec Bus Lines*, 289 NLRB 1021 (1988), "even inadvertent notice" to a shop steward is notice to the union. *Id.* at *1038. To

[25] The arbitration of the Watson Grievance is pertinent—if for no other reason—to show that the Union understood the Company's position that it could sell any route, at any time, without violating the Expired Contract. (RX-43, p. 9.) Notably, the Union's own legal counsel purposely elicited this testimony from Company witnesses on cross examination, hoping to shed light on the magnitude of the issue and persuade Arbitrator Paolucci that the Company's position was unreasonable because it would have implications far beyond the Watson Grievance. (RX-43, p. 9.) The Union's post-arbitration brief argues that, "taking the Company's argument to its logical conclusion, the Company could [sell] all of the routes performed by bargaining unit employees without any opportunity for the Union to challenge such action," and that "the Arbitrator should not give countenance to this radical Company position." (RX-43, p. 10.) The Union ends its post-arbitration brief by demanding (among other remedies) "a cease and desist order requiring the Company to discontinue [selling routes] based on the language contained in the [Expired Agreement]." (RX-43, p. 13.)

determine whether notice to a steward is sufficient notice to the union, the Board considers whether the steward was acting as the union's agent when notice was given, which may be established if the steward (1) was assigned to ensure compliance with the labor agreement on the jobsite; (2) had authority to handle minor problems arising between unit employees and management; (3) transmitted messages and information from the union to its members; (4) maintained employee work dates and hours and verified this information with the union; and/or (5) the steward collected dues payments from members. *UBC,* 305 NLRB No. 118 (1991).

Here, the Company's verbal notice to Union Stewards was clearly sufficient to put the Union on notice of its decisions to sell routes to independent distributors. First, all the parties' past labor agreements expressly allow Union Stewards to "receive complaints on conditions covered by [the labor agreement] and make proper inquiries thereto and to perform such other duties that may be imposed upon him by the Union."[26] (JX-1, pp. 20-21; RX-44, p. 14; RX-45, p. 14; RX-46, p. 16.) Second, it is undisputed that Union Stewards were assigned to ensure contractual compliance at each jobsite they were assigned to represent, and they in fact exercised their authority to enforce the applicable labor agreement, when necessary. Neither Mike-sell's nor its Union Stewards were ever informed of any rule or requirement that certain types of notices must be given to a Union representative other than the Union Steward.[27]

Even assuming notice to a Union Steward was somehow inadequate to put the Union on-notice of the sales, the Union certainly had at least ***constructive notice*** of them. For example, in *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191 (1992), the employer failed to make fringe benefit fund payments on behalf of employees and failed to pay contract wages. *Id.* at 192-93. In finding a violation of Section 8(a)(5), the Board limited the union's remedy, citing its failure to file a charge within the period proscribed by Section 10(b) of the Act. *Id.* at 192. The union argued it could not file an earlier charge because it did not have notice of the employer's violations. *Id.* But the union never appointed a steward at the facility as permitted by contract, and union officials rarely visited the facility, although they were never barred from meeting with

[26] In contrast, Union Business Agents merely have the right to "visit that part of the Company premises used by bargaining unit members" after "first secur[ing] the permission from management." (JX-1, pp. 20-21; RX-44, p. 14; RX-45, p. 14; RX-46, p. 16.)

[27] If an employer knows the steward does ***not*** have authority as an agent of the union, then notice to the steward does ***not*** constitute notice to the union. *See, e.g., Philadelphia Coca-Cola Bottling Co.,* 340 NLRB 349 (2003) (union was not on-notice where both labor agreement and letter sent to employer unambiguously informed employer of limitations on the steward's authority).

employees and were never affirmatively misled. *Id.* at 191-92. In finding the union had constructive knowledge of the employer's violations, the Board explained:

> [T]he Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the . . . contractual noncompliance. While a union is not required to aggressively police its contracts . . . to meet the reasonable diligence standard, it cannot with impunity [sic] ignore an employer or a unit, . . .and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of . . . unilateral changes. This is not a case where information regarding misconduct is only in the hands of the employer, where an employer has concealed its misconduct, or where the size of an employer's operation prevents ready discovery of the misconduct. Rather, this is a case where the Union, if it had exercised reasonable diligence, would clearly have been alerted much earlier to the misconduct.

*Id.* at 193; *see also John Morrell & Co.*, 304 NLRB 896, 899 (1991) (union should have known employer's actions were designed to rid itself of unionization and contractual obligations, where union knew employer had (1) requested reductions in contractual wages; (2) closed plants when union rejected wage cuts; (3) bargained for the deletion of contractual references to closed plants; and (4) reopened plants but refused to apply new labor agreement based on removal of contractual references when plants were closed).

Here, as in *Moeller Bros.*, the Union had at least constructive notice that Mike-sell's was selling routes to independent distributors. Mike-sell's has maintained a relatively small in-house distribution network, employing fewer than 100 Sales Drivers (i.e., one per route) even at the height of its operation. (R. Tr. 36-38; M. Tr. 246.) This small-scale operation, in turn, means that the Union has a relatively small bargaining unit to monitor. Although the sales occurred gradually, they also continued steadily for over a decade, during which time the Union expressly conceded that—with each sale—"the bargaining unit represented by the Union was decreased by one position." (RX-43, p. 8.) It is well-settled that the Union "has the same legitimate interest in protecting the work of the employees from slow erosion that it has in protecting the work against sudden and total disappearance." *Shell Oil*, 149 NLRB No. 22, at *294.

Before any sales took place, it is undisputed that Mike-sell's informed the Union Steward for the affected DC, as well as any Sales Drivers who would be affected by the sales. (M. Tr. 303, 305-06, 308, 321, 330, 332, 346, 357, 360; R. Tr. 49-50, 54, 70, 73, 75-77, 90, 102, 104-05, 107-09, 128, 134-35, 153, 169, 177-78, 180-85, 187-88, 190-94; RX-43, p. 4.) Affected Sales Drivers either bumped into a different route, accepted a severance package, and/or resigned/retired without severance. (M. Tr. 113, 182, 248-49, 306-07,

342, 377, 408; R. Tr. 38, 55-56, 130, 138, 141, 168, 177-79, 180-81, 186, 195-96, 04, 223-24, 258, 261, 307-10; JX-1, pp. 16-17; RX-2, pp. 7-8; RX-47.) Any of these options should have been known to the Union because, as in *Moeller Bros.*, this is not a situation where the sales/re-sales had been concealed. Mike-sell's openly communicated them to both Sales Drivers and Union Stewards. If nothing else, the steady decrease in dues-paying Sales Drivers—combined with the increased presence of independent distributors at the Dayton DC, loading their trucks alongside Union-represented Sales Drivers—should have alerted the Union to the situation—particularly where the very same Union processed a warehouse grievance about it. (M. Tr. 690-91, 245-48; R. Tr. 294-97.) In short, the Union cannot simply "put its head in the sand" and claim that it was not on-notice of dozens of recurrent sales at the facilities it represents. Even the slightest diligence would have led the Union to discover these prior route sales to independent distributors.

**D. Assuming *arguendo* that a binding past practice allowed Mike-sell's to sell its routes to independent distributors if—*and only if*—each individual route was unprofitable (as the Union may argue), then the 2016 sales at issue would comport with that practice.**

Mike-sell's has consistently maintained, and its witnesses have exhaustively testified, that the entire in-house distribution model is unprofitable.[28] (M. Tr. 151-52, 234-44, 237-38, 243-46, 305, 364, 374, 538-50, 605, 669-70, 834-35, 898, 972; R. Tr. 44, 92-93, 233-37, 260.) It is undisputed that the Company's decisions to sell routes have ***not*** been based on ***individual route profitability***, nor is there any evidence that Mike-sell's ever suggested as much to the Union. (M. Tr. 151-52, 234-44, 237-38, 243-46, 305, 364, 374, 538-50, 605, 669-70, 834-35, 898, 972; R. Tr. 44, 92-93, 213, 233-37.) Nevertheless, the Union has repeatedly insisted that, if any past practice permits the sale of routes, it is limited to situations where each individual route to be sold is "unprofitable."[29] Even assuming Mike-sell's was limited to selling only routes that were individually unprofitable, it is undisputed that the decision to sell Routes 102, 104, 122, and 131 was consistent with that requirement, as all four routes "were reporting significant losses" for 2016. (M. Tr.

[28] Mike-sell's produced a plethora of financial information to the Union to demonstrate the ongoing losses attributable to the route sales operation, including Profit & Loss Statements for the route sales division for the years 2013, 2014, 2015, and YTD-2016. (M. Tr. 261-62, 475-83, 882-92; RX-15; RX-40; RX-42.)

[29] The Union seems to conflate "sales volume" with "profitability." It is true that certain routes have higher sales volume than others (e.g., the Marion route), but this does not mean that a route with a higher sales volume is more "profitable." (M. Tr. 424-27; RX-14.)

470-74.) Hence, whether the sales were based on individual route profitability (as the Union maintains) or profitability of the route sales division as a whole (as Mike-sell's maintains), the outcome would be the same.

Assuming for the sake of argument that there was a past practice of selling routes based on their ***individual profitability*** (or lack thereof), then the Union would be entitled to information regarding individual route profitability in response to its August 31, 2016, information request.[30] (JX-8.) *See, e.g., Southern Nevada Home Builders Assn.*, 274 NLRB 350, 351 (1985); (requiring employers to produce that information needed by the union to fulfill its ***statutory*** obligations*); North Bay Center*, 287 NLRB 1223, fn.1 (1988) (same). But even if Mike-sell's had violated the Act by failing to provide the information, the proper remedy would ***not*** involve recession of the sale of Routes 102, 104, 122, and 131. Rather, the proper remedy would be to require Mike-sell's to furnish the requested information to the Union. *See Albertson's, Inc.*, 310 NLRB 1176, 1178-79 (1993) (employer violated the Act by failing to produce documents that were requested by union in order to help determine if employee was disciplined for just cause, and as a remedy, employer was ordered to provide requested information to union, but was ***not*** ordered to rescind discipline); *Kennametal, Inc.*, 358 NLRB No. 68, **555-56 (June 26, 2012) (employer's unilateral rule implementation was ***not*** itself unlawful, but employer was required to respond to information request related to the same; and when employer refused to respond to information request, the proper remedy was not rescission of rule but production of requested information).

## IV. CONCLUSION

For the reasons set forth herein, as well as in the Company's post-hearing brief at the merits stage, the General Counsel's entire Complaint should be dismissed.

[30] Mike-sell's stands by its position that the decision to sell individual routes reflects a fundamental change in the scope and direction of the Company's enterprise—akin to closing discrete, stand-alone business units—which is ***not*** a mandatory subject of bargaining.[30] *See, e.g., First Nat'l Maint.*, 452 U.S. 666 (1981). Because the decision to sell routes is ***neither*** a mandatory bargaining subject nor a material change from past practice—and because, in any event, the Union waived its right to bargain—Mike-sell's need not produce information requested by the Union for the specific purpose of decisional bargaining. Nevertheless, the Company sets forth this alternative argument, in the event that a limited/conditional past practice is recognized.

## V. PROPOSED CONCLUSIONS OF LAW

For the reasons set forth herein, as well as in the Company's post-hearing brief at the merits stage, the General Counsel has not proven by a preponderance of the evidence that Mike-sell's violated Section 8(a)(1) or 8(a)(5) of the Act, as alleged in the Complaint.

## VI. PROPOSED ORDER

The Complaint should be dismissed in its entirety.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2018, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.gov) to the National Labor Relations Board's Office of the Division of Judges, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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